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February 20, 2015

VIA ECF & HAND DELIVERY

Hon. Richard M. Berman
United States District Court, Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Courtroom 12D
New York, NY 10007

Re: *Nat'l Credit Union Admin. Board v. Wells Fargo Bank, N.A.*, 14-CV-10067 (S.D.N.Y.)

Dear Judge Berman:

We represent Wells Fargo Bank, N.A., as trustee ("Wells Fargo"), in the above-referenced case, and we write to set forth the bases for Wells Fargo's anticipated motion to dismiss. As Trustee for the 27 separate RMBS Trusts at issue in this lawsuit, Wells Fargo's role, as prescribed by contract, is to perform certain limited functions only as expressly agreed upon and set forth in the Governing Agreements for each Trust. Plaintiffs wrongfully seek to hold Wells Fargo responsible for the losses that Plaintiffs themselves admit were actually caused by other parties to the securitizations.

The Complaint's theories bear no relation to the provisions of the Governing Agreements, common law, or to Wells Fargo's limited contractually-specified role as trustee for the Trusts at issue. Space limitations restrict our ability to detail all of the Complaint's flaws. The nature of those flaws is no secret to NCUA, which already is responding in other actions to motions to dismiss similar complaints. The flaws identified in connection with those other actions are incorporated herein, and are further elaborated upon and supplemented as follows:

First, NCUA's Trust Indenture Act ("TIA") claim should be dismissed as to the 25 PSA Trusts, since the TIA does not apply to non-indenture trusts. ***Second***, NCUA's TIA claim should be dismissed

as to the 2 Indenture Trusts as well. Subsection 315(a)(1) of the TIA does not create a private right of action. In addition, the alleged representation and warranty ("R&W") breaches and servicing failures that form the crux of the Complaint do not trigger Events of Defaults as defined in the relevant Indentures. Accordingly, they cannot be a predicate for a TIA claim.

Third, NCUA fails to allege a breach of the TIA based on Wells Fargo's purported failures (a) to review mortgage files, and notify certificateholders and others of "deficiencies," and (b) to take action when there was evidence of "defective" loans. NCUA's allegations are too generic to plausibly plead a TIA claim. NCUA does not allege which originator's loans ended up in which Trusts, much less which "responsible party" breached which R&Ws in which Trusts. NCUA also fails to tie any duty Wells Fargo purportedly breached to any specific provision of any contract. Indeed, the Governing Agreements flatly contradict NCUA's R&W-related TIA claim. For example, in the Indentures Wells Fargo has a duty to enforce R&W breaches only "upon discovery" of such a R&W breach (and then only after all numerous conditions precedent are satisfied). NCUA fails to adequately allege "discovery" of any R&W breach by Wells Fargo. *See FHFA v. HSBC N.A. Holdings, Inc.*, __ F.Supp.2d __, 2014 WL 3702587, at *20–21 (S.D.N.Y. July 25, 2014); *BNYM Trust Co. v. Morgan Stanley Mortg. Capital*, No. 11 Civ. 0505 (CM)(GWG), 2013 U.S. Dist. LEXIS 87863, at *55 (S.D.N.Y. June 19, 2013). NCUA's claims also rest on factual premises refuted by publicly available documents. In addition, NCUA's R&W-related claims and many servicing-related claims are time-barred.

Fourth, NCUA's Streit Act claims should be dismissed. The Streit Act does not govern trusts, like those here, which are merely collateralized by a pool of mortgage loans. *See Prudence Realization Corp. v. Atwell*, 35 N.Y.S.2d 1001, 1005 (1st Dep't 1942), *aff'd* 290 N.Y. 597 (1943) (per curiam). Nor

does it provide Certificateholders, like NCUA, any cause of action. *See* Streit Act §125 (defining "mortgage investments" to exclude equity investments). The Streit Act also does not give rise to a private right of action. Even if it did, §§124 and 126 of the Streit Act do not impose any statutory duties on a trustee that can form the basis for a claim. To the extent such duties did emanate from the statute (as opposed to the PSAs or Indenture), NCUA fails to adequately allege breaches of those duties. *See* this Letter, *supra*.

Fifth, NCUA lacks standing. NCUA re-securitized its holdings in all of the securities at issue in connection with the NCUA Guaranteed Notes Program. Any claims NCUA may have had would have been transferred as part of the re-securitization process. To the extent they were not, NCUA still lacks standing to assert claims predicated on alleged damages that arose from alleged inaction or conduct that pre-dated the re-securitization of the Trusts. Such claims are barred by the no-action clauses and negating clauses in the Governing Agreements. NCUA fails to adequately allege damages to the tranches they hold (so as to have standing). NCUA also lacks standing under General Obligations Law § 13-107. In addition, certain of the Governing Agreements provide that Wells Fargo cannot be held liable for consequential damages.

Accordingly, for the foregoing reasons, the complaint should be dismissed in its entirety with prejudice.

Respectfully Submitted,

/s/ Jayant W. Tambe

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